

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
:
v. : CRIMINAL INDICTMENT
: NO. 1:05-CR-393-RWS-JFK
SIMEON VELASQUEZ, :
a/k/a Chino :
Defendant. :

GOVERNMENT'S SECOND MOTION IN LIMINE

COMES NOW the United States of America, by and through counsel, David E. Nahmias, United States Attorney, and G. Scott Hulsey, Assistant United States Attorney, Northern District of Georgia, and hereby files the Government's Second Motion in Limine.

A. VICTIM'S PRIOR BAD ACTS

The defendant should be precluded from introducing any evidence at trial of the victim's prior bad acts, including the victim's criminal history, and any specific instances of conduct that allegedly occurred during the victim's incarceration. Although evidence of the victim's reputation for aggressiveness or violence may be admissible, evidence of any specific instances of conduct is not.

"A defendant can introduce evidence of a victim's violent character to establish conformity therewith in homicide cases where self-defense is raised." United States v. Gregg, 451 F.3d 930, 933 (8th Cir. 2006), citing Fed. R. Evid. 404(a)(2). That is, to the

extent the defendant in the instant case is raising a defense of self-defense, under Rule 404(a)(2),¹ evidence of the victim's aggressive character may be relevant to establish the victim was the aggressor. United States v. Bautista, 145 F.3d 1140, 1152 (10th Cir. 1998). However, "Federal Rule of Evidence 405 establishes the permissible methods of proving character under Rule 404(a)(2)." United States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992). Specifically, Rule 405 states:

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Fed. R. Evid. 405.

¹Rule 404(a)(2) provides:

(a) Character Evidence Generally. - Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

...
(2) Character of Alleged Victim. - Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.

Fed. R. Evid. 404(a)(2).

Rule 405 "limits the type of character evidence to reputation or opinion evidence unless the character or trait is an essential element of the charge, claim, or defense." Bautista, 145 F.3d at 1152. "[A] victim's violent character is not an essential element of the charge of murder or the defense of self-defense." Gregg, 451 F.3d at 934; Bautista, 145 F.3d at 1152 (evidence of a victim's violent character to prove the victim was the aggressor is circumstantial use of character evidence); United States v. Smith, 230 F.3d 300, 308 (7th Cir. 2000)(specific prior acts of the victim, unknown to the one claiming self-defense, are circumstantial in nature and not an essential element of the claim).

Consequently, in the instant case, evidence of the victim's character must be limited to reputation or opinion evidence, and evidence of specific bad acts or instances of conduct must be excluded. Talamante, 981 F.2d 1156 (use of evidence of a victim's violent character to prove the victim was the aggressor is circumstantial use of character evidence, and in that case Rule 405 allows proof of character only by reputation and opinion); Bautista, 145 F.3d at 1152 (defendant could have introduced evidence of the victim's reputation for aggressiveness, but could not have introduced specific instances of aggressive conduct).

B. WITNESS' CHARACTERIZATION OF VICTIM AS "CRAZY"

Notwithstanding the fact that evidence of the victim's reputation for aggressiveness or violence may be admissible, as discussed above, lay witness testimony characterizing the victim as "crazy" is inadmissible.

Under Fed. R. Evid. 701, opinion testimony by a lay witness is admissible within certain limits:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701; Williams v. Muhammad's Holy Temple of Islam, 2006 WL 297448, *2 (E.D.N.Y. Feb. 8, 2006). "A lay witness's opinion that another person is 'crazy' does not meet these criteria [of Rule 701]." Williams, 2006 WL 297448, *2, 4. "The witness may describe what [he or she] observed, but may not provide an opinion regarding [the victim's] mental state." Id.

C. VICTIM'S HOMOSEXUAL CONDUCT

Any evidence of the victim's alleged homosexual conduct should be excluded. The victim's alleged homosexual conduct is not an essential element of the murder charge nor of the defense of self-defense. See Bautista, 145 F.3d at 1151-1152. Accordingly, such evidence is irrelevant, and the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. See

Fed. R. Evid. 402 ("[e]vidence which is not relevant is not admissible"); Fed. R. Evid. 403; Bautista, 145 F.3d at 1152 (the court, agreeing that testimony regarding the victim's homosexuality was irrelevant and potentially highly prejudicial, stated "[w]e fail to discern how the victim's sexual orientation is relevant to the charge of second-degree murder or to a defense of "heat of passion").

CONCLUSION

For the foregoing reasons, the government requests that the Court grant the government's Motion In Limine and issue a pretrial ruling that evidence of the following be excluded at trial: (1) the victim's prior bad acts; (2) lay witness' characterization of the victim as "crazy;" and, (3) the victim's alleged homosexual conduct.

Respectfully submitted,

DAVID E. NAHMIAS
UNITED STATES ATTORNEY

s/G. SCOTT HULSEY
ASSISTANT UNITED STATES ATTORNEY
Georgia Bar No. 377480

400 Richard B. Russell Building
75 Spring Street, SW
Atlanta, Georgia 30303
(404) 581-6000; (404) 581-6181 FAX

Theresa M. Bass
Paralegal Specialist

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
: :
v. : CRIMINAL INDICTMENT
: NO. 1:05-CR-393
SIMEON VELASQUEZ, :
a/k/a Chino :
: :
Defendant.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the above was prepared using Courier New 12 point font, and that I have caused a copy of the foregoing GOVERNMENT'S SECOND MOTION IN LIMINE to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorney(s) of record:

Mildred Geckler Dunn
Anna Blitz
Federal Defendant Program, Inc.
Suite 1700, The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303 Mildred Geckler Dunn

This 22nd day of January, 2007.

s/G. SCOTT HULSEY
ASSISTANT UNITED STATES ATTORNEY